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No. 93-1899

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners,

vs.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

I. The Federal Claim Was Adequately Presented in the State System....2

II. The State Must Prove By Clear and Convincing Evidence that a Parent is Unfit....4

Conclusion....6

TABLE OF AUTHORITIES

Bryant v. Zimmerman, 278 U.S. 63;
49 S. Ct. 61 (1928).....4

Oxley Stave Co. v. Butler County, 166 U.S. 648;
17 S.Ct. 709 (1897).....4

Santosky v. Kramer, 455 U.S. 745;
71 L. Ed. 2d 599 (1982).....3,4,5

Webb v. Webb, 451 U.S. 493
101 S. Ct. 1889 (1981).....4

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Petitioners, Eloy Gener Perez and Graciela Almodovar, replies solely to the issues first raised in the brief in opposition of Respondent, New Jersey Division of Youth and Family Services, without waiver of any of the points already addressed in the petition.

I

The Federal Claim Was Adequately Presented in the State System

Petioners made specific references to the unconstitutionality of terminating parental rights, without a finding of unfitness, in both their petition to the Supreme Court of the State of New Jersey and in their brief to the Appellate Division of the State of New Jersey. It was absolutely clear that Petioners constitutional challenge raised a federal claim and due process issue. In the petition to the Supreme Court of the State of New Jersey, in the section entitled "Issues Presented for Review", Petitioners stated as follows:

1. Is it constitutional to terminate a father and mother's parental rights when there is no finding of parental unfitness, however, there is a determination that bonding has occurred with the foster caretakers due primarily to DYFS' delay in reuniting the child with his natural parents?

***

3. Does the ***federal*** and state caselaw and statutory law relied upon by the lower courts support a termination of parental rights under the facts presented? (emphasis added)

In the section entitled "Errors Complained Of", Petitioners state as follows:

1. The parental rights of E.G.P. and G.A. have been unconstitutionally terminated due to there never having been a finding of parental unfitness.

***

3. The ***federal*** and state law relied upon does not support a termination of parental rights under the facts presented in this case. (emphasis added)

In Petioners' legal argument, under the section entitled "Why the Affirmance of the Appellate Division Should be Reversed", it is stated, "[t]hus until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of parental rights.' " Quoting, *Santosky v. Kramer*, 455 *U.S.* 745, 760; 71 *L.Ed. 2d* 599, 611 (1982).

Petitioners clearly challenged the federal and state constitutionality of terminating parental rights without a finding of unfitness. Additionally, Petitioners clearly challenged the federal and state constitutionality of terminating parental rights, when it is alleged that New Jersey's Division and Youth and Family Services delayed the reunification of parent and child, thus resulting in a violation of Petitioners' due process rights. Under the section entitiled "Comments on the Appellate Division Decision", Petitoners asserted, "E.P.G. and G.A. did everything that was asked of them by DYFS to secure the return of their children. It appears that DYFS prolonged the childrens return by creating new obstacles for them." It is disingenuous for Respondent to assert that the issue of a violation of due process was not raised in the petition to the New Jersey Supreme Court.

It states in Petitioners' brief to the New Jersey Appellate Division, under the legal argument section entitled "The Trial Court Erred in Terminating the Parental Rights of G.A. and E.G.P. to Their Son O.G." as follows: "[t]hus 'until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of parental rights,' " Quoting, *Santosky v. Kramer*, 455 *U.S.* 745, 760; 71 *L. Ed. 2d* 599, 611 (1982). Petitioners further stated, that "[the] Division's refusal to work with the parents and failure to offer services caused undue time to elapse." Petitoners give a plethora of examples in this brief as to the specific conduct of the Division of Youth and Family Services that resulted in the violation of Petitioners' due process rights. Again, the assertion by Respondent that the federal claim was not raised with the lower court is disingenuous.

This Court stated, "[i]t is a long-settled rule that the jurisdication of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented." *Webb v. Webb*, 451 *U.S.* 493, 496; 101 *S. Ct.* 1889, 1892 (1981), *citing, New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 *S. Ct.* 61, 63 (1928); *Oxley Stave Co. v. Butler County*, 166 *U.S.* 648, 655, 17 *S. Ct.* 709, 711 (1897). A review of the Petition for Certification to the Supreme Court of the State of New Jersey and Petitioners' brief to the Appellate Divison of the State of New Jersey confirms, that not only is there a clear implication that the federal claim was raised below, it is clearly expressed by Petitioners as well.

II

The State Must Prove By Clear and Convincing Evidence That A Parent Is Unfit

Respondent asserts, that so long as *their* standard of termination of parental rights is proved by clear and convincing evidence, it passes federal constitutional scrutiny. Petioners assert that in *Santosky v. Kramer* the state must prove by clear and convincing evidence parental unfitness permanent neglect. *Santosky v. Kramer*, 455 *U.S.* 745, 760,761;102 *S. Ct.* 1388, 1398,1399 (1982). The argument by the Respondent gives little meaning to the clear and convincing evidentiary standard. In the case at hand, the State of New Jersey replaces parental unfitness or permanent neglect with the best interests of the child standard. It ignores the underlying message in *Santosky v. Kramer*, which is, that it is in the best interest of the child that the parental rights of their parents not be erroneously terminated. The United States Supreme Court has determined that the fourteenth amendment requires a finding of unfitness or permanent neglect by clear and convincing evidence, otherwise there is an erroronous termination.

Petitoners were never found to be unfit, abusive or neglectful of their children. In fact, three of their four children were returned to them six months before the hearing was held to terminate their parental rights to their youngest child, Olav. Their parental rights were terminated on a "psychological bonding theory". The argument of the State is that, it proved by clear and convincing evidence that the child had psychologically bonded with his foster caretakers, and therefore, Petitioners' parental rights should be terminated. Petitioners' argument is that there is no federal or state Constitutional basis for terminating their parental rights on this theory.

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and because Respondent has not overcome those reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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